IN THE

United States Circuit Court of Appeals,

NINTH CIRCUIT

No. 788, In Equity.

SAMUEL BROS., & CO., Appellants,

vs.

THE HOSTETTER CO., Appellee.

Mr. Clarke's Statement for Appellee.

ALBERT H. CLARKE,
Solicitor and of Counsel for Appellees.

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Mr. Clarke's Counter Statement.

To the Honorable, the Judges of said Court:

The above case was tried before Judge Morrow, one year ago, and his *opinion* (pp. 553–4 of Record) handed down in July, 1901,—eight cases, including appellants, were, by agreement, tried as one. Several other suits, instituted by the Hostetter Co., were heard at the same time, and all not settled by compromise, were also argued, submitted and decided in due time. All save Samuel *seemed* contented, and injunctions duly issued. They now sell the genuine article of bitters, presumably. At any rate, appellees' sales have increased, and the public have an assurance that the article demanded may be obtained.

Samuel was discontented, and has filed a "round robin," of only twenty-seven errors committed by Judge Morrow. Many of these "errors" charged are fallacious, and without the foundation of proofs adduced. They travel in a circle; go outside the record and end where they begin, by the plaint that the case went against appellant.

If the findings of fact, by the Court below, are not deemed by this Court conclusive, then the present presentation of the case amounts to a rehearing, or new trial.

As to the Transactions.

Messrs. Evers and Morrison, witnesses for appellee, testify to having made two calls at appellant's store (pp. 109, 179) at different dates, that on demand for Hostetters Bitters, were sold by Samuel, bitters by the gallon, (the genuine is never sold in that manner.) and furnished with empty genuine bottles. This would seem to be sufficient evidence, if believed. We have the witness' statements, besides the exhibits, the articles furnished, and Morrison (p. 110) relates a queer story, quite reasonable though, about the Hostetter Company selling bitters in bulk, to enable Samuel and a few other favored ones to reap a rich harvest. Samuel and Levy deny all appellees witnesses say, and yet there was but one of them present at the time the purchases were made; Samuel says, (p. 232): "I told them that the bitters were better than Hostetters Bitters. They were a bitters better than Hostetter's Bitters, and *naturally I tried to sell my own goods.*" Then on page 233, he says in answer to his counsel, question 12, (to which said question the Court's attention is respectfully called, as it is a fair sample of many others), "*No, sir;* they asked me for a bottle, and I gave them a bottle." Thus, from appellant's own mouth has he proved himself guilty of "unfair dealing." But little stress was made at the argument of this case in the Court below, upon the question of fact relating to the transactions, but the main defense was that Hostetters Bitters were a most unwarrantable fraud upon the public, and defendants, all of them, eight in number, and this was sought to be proved by strictly *soi disant* expert testimony, with the exception of the introduction of "a terrible example" in the shape of a lawyer, who partook of the bitters no less than five excessive doses, and yet the only evil (?) effect produced appears to have been that "it made him sleepy." Bad for a lawyer; he should be wide awake at all times. (*Vide*, Testimony of L. M. Robbins, Esq., 360).

It may safely be stated this is the only testimony offered on the part of appellants to prove the so-claimed dire and baleful effects of Hostetter's Bitters. All the balance is of the expert kind, yet none of it, on behalf of appellants, questions the character of the genuine Hostetter's Bitters; but instead a "concoction" (to use a term "concocted" by appellants' learned counsel) for the occasion, taken from a bottle which Mr. Countryman said contained the genuine bitters, yet positively refused to allow even a half ounce to be taken therefrom and given Mr. Galbaith for the purpose of examination and comparison; so that it may well be claimed the liquid was not Hostetter's Bitters. Quite likely it was a bottle of Samuel's "better than Hostetter's."

The question calling for opinions of appellants' expert witnesses seem to have been based upon the effect of *alcohol* taken in unreasonable doses, and they were quite unanimous in declaring their opinions as physicians. *Not one had used or prescribed Hostetter's Bitters.*

The Court below, in its opinion, seems to have paid little heed to expert testimony.

Not much testimony of this class, strictly speaking, was offered by appellees; yet at the same time testimony of persons well qualified, and who know whereof they speak, is entitled to reasonable consideration, including witnesses' *opinions:* at least being called as experts does not *disqualify* them as witnesses regarding facts.

Let us examine whether said witnesses, called by appellee, were so called "expert," in *all* they said.

Dr. John F. Golding, (p. 473 *et seq.*) presents all the qualifications necessary for him to testify as an expert. He goes further. He says, "*I have prescribed said bitters,* (Hostetter's) *with beneficial results.*" He explains that a *menstruum* is required in all such preparations. He tells that a wine glass contains just two fluid ounces, as established by the U. S. Pharmacopœia of 1890. He says there is nothing false or misleading (p. 477) in the directions on

the label and the bitters can be safely and beneficially used for any and all of the said complaints, by persons who are afflicted therewith." This last must be "opinion," yet on the same page he says. "I have used it with beneficial effects for many of the ailments that are on said label set forth, *and know* that it has been of value and beneficial to patients thus afflicted."

Dr. Golding stands high in the profession. He could not and he would not give his aid to any unworthy cause. The depositions of this physician and four others were taken upon *interrogatories*, in New York, and they have used and still use Hostetter's bitters. *None of them are personally acquainted with any member of the Hostetter Company, Dr, J. M. Williamson*, (for appellants) says, "We ought to be consulted whenever anybody has to take a dose of medecine."

Major Morle, clerk of the U. S. Circuit Court at Brooklyn, must use Hostetters bitters no more in his family. If his wife is improving, after taking them, he does not know it, as a fact, because a Dr. Williamson was not consulted.

(*Vide* Assignment of Error, No. 28.)

However, the Court below has based its opinion upon the fact of the endorsement by the *public* with its seal of approval and of its *commercial value*. The appellee's business is what the appellants are after. They claim Hostetter's Bitters are entirely unfit to be sold, are dangerous and worthless; yet still are they most anxious to obtain the right to use the name, the bottles, trade marks, and above all the *formula*. Yes, "they all cry for the *formula*."

Athough in the case at bar the answer alleges the formula to be well known, yet not a particle of testimony was introduced in support of the allegation.

If the appellant is making bitters of its own, why does it not appear it advertises them, registers a trade mark, and thus compete with appellee in business? One would suppose that with a certain class it would reap a rich harvest.

Yes, if it had the Hostetters' business, the formula, coupled with the commercial integrity and ability of the Hostetters, it could get along quite well, undoubtedly.

Several of the assignments of error make plaint regarding the *abreviations* of the name Hostetters' Bitters. I am not surprised, since it would like to be able to use said words and letters. How easy for the wholesale man to say to his customer, "No, I have no Hostetters' Bitters, but I have some fine 'H' Bitters," accompanied by an intelligent wink.

The "round robin" sort of "errors" committed by Judge Morrow I will not attempt to dwell upon except as an entirety, and not having as yet received a copy of appellant's brief, can only anticipate the same, in part.

Much stress is laid upon the fact that Judge Morrow allowed appellee to file certified copies of the trade-mark and articles of incorporation, at the time of the argument.

Is not full authority for so doing given Circuit Courts, under Act of Congress? *Vide* Revised Statutes, Sec. 918.

Then, at the argument, it was claimed there were irregularities in the depositions taken at Pittsburgh. The writer was taken by suprise and unable to explain. No notice of motion to strike out the depositions was given. However, was it not rather late to complain or make objections, when none had been raised at the time of taking? No one appeared for defendants, and had no notice at all been given, still we had the right to take proofs, and they had the right to cross-examine afterwards, under Rule 68, Equity Practice.

Rev. Stat. Sec. 866.

I regret Mr. Countryman was unable to go to Pittsburgh to cross-examine and interlard the record with his most remarkable "objections," seventy-three of which he spread upon the record containing testimony of Mr. Morrison—21 pages—at least one-half of the space being used for such objections. Pretty hard on my good natured colleague, who seldom either cross-examined or objected, thus

giving appellant full swing for leading questions and their answers.

Has the Court Below Decided the Case Erroneously?

The proofs are all in favor of appellee. That Samuel Bros. & Co. were guilty of the acts charged, is surely well established by the proofs. They are of that class ever living and thriving upon the brain and industry of others. "They toil not, neither do they spin", or perform other manual labor. A neighboring merchant who discovers, or placed upon the market an article that becomes desirable and profitable is at once pirated upon by the Samuels, the Martinonis, Levys *et al.* It was full time the Hostetter Company sought to protect itself. If even the depositions of Robb. Carson, McCullough and Crooks be suppressed there is sufficient evidence yet remaining to prove title to the trade-mark and the plant at Pittsburgh to be in appellees, the certificate of corporation, the conveyance of the goods, which was offered and allowed. Besides, it is really asserted by appellants in their answer that the business originated with Dr. J. Hostetter, the grandfather of the present owners.

It would seem strange indeed if this Court should see fit to undo and annul any of the most equitable proceedings in the Court below.

To grant the prayer of the appellant would be to ruin the business which has been most honorably and faithfully conducted for fifty years, by appellee and its predecessors, paying large sums of money annually to the Government, and employing a large number of persons. Appellant was challenged to produce the single instance of a person damaged or injured by partaking of the stomach bitters, and has failed. The "errors" assigned are quite technical. Great latitude is observed in allowing such testimony to be introduced as will tend to the Court's enlightenment and is in conformity with justice and equity.

It would hardly seem necessary to cite authorities in support of the repeated assertion of the Courts all over the world, that "one man cannot sell his goods as those of another."

Appellees goods have been pirated upon all over the country, and even in South America, and in Australia.

(1st Victoria Reports p. 7.)

In *Hostetter vs. Becker*, 73 F R., 297, Judge Coxe makes use of the following language:

"Admitting that nothing was said upon the occasions when these bottles were given away with the demijohn, I think the inference is most conclusive that it was the intention of the defendant or his agents that the demijohn should be poured into the bottles and sold in that way. No other presumption. in my view, can arise from that conjunction of facts. Therefore, to draw an analogy from the patent law, it is a case of contributory infringement. Of course the buyers of defendant's bitters were not deceived. It is not pretented that they were. And that is not the theory of the Bill, as I understand it. *But the defendant placed in the hands of buyers implements to enable them to deceive the general public.* It cannot be successfully disputed that it would be a fraud upon the complainant's rights if a retail dealer should fill an old Hostetter's bottle with spurious bitters and sell it to retail purchasers as the genuine Hostetter's Bitters; and yet this is, in the eye of the law, precisely what the defendant does. While not doing that himself he enables others to do it, and he suggests to them the way in which it can be done successfully. * * * That is the law which has been enunciated ever since the doctrine of unfair competition in trade has found a place in the law books."

The burden of proof, in the Court below, was upon respondents to show that the bitters made by the complainant were *injurious*. In this they signally failed. Not a single instance of deleterious effects was shown. Not an

iota of testimony was adduced. They seemed to have taken it for granted it was a bad thing, or not so good and pure as the "H" Bitters they sold.

Since appellant was unable to show that appellee's bitters had ever injured a single person during the time—above 40 years—it had been constantly upon the market, and kept among the family medicines of thousands of people, and since it utterly failed to show the least act of fraud or misrepresentation on the part of appellee, and since appellee has adduced positive proof of the beneficial results following the taking of this medicinal preparation, the public at large having received it with marked favor—then how can it be expected this Court will reverse the Court below.

It will not surely destroy what might equitably be termed the "vested rights" of appellee.

A slight irregularity in practice is not enough, as it did not in the least redound to the damage or injury of the appellant.

Respectfully submitted,

ALBERT H. CLARKE,

Solicitor and of Counsel for Appellee.

March, 1902.